SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1217

VIRGINIA DARE TRANSPORTATION COMPANY, INC.
PETITIONER

vs.

NORFOLK SOUTHERN BUS CORPORATION
RESPONDENT

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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We submit that the *certiorari* prayed for by Virginia Dare Transportation Company, Inc., should not be granted.

Virginia Dare's application for *certiorari* and the brief in support thereof attempt to get away from the illegal contract of June 6, 1940 (Record 210-215), which is the contract in question in this case, and the

alleged breach of sections 3 and 4 of which is the heart and soul of the counterclaim (Record 6, 7), and to bring in an irrelevant contract of May 24, 1940, which has no bearing upon the present question, and which was not even printed in the printed record, but has been printed for the first time with Virginia Dare's petition for *certiorari* at page 11.

We submit that the contract of June 6, 1940, in controversy in this case, is so plainly illegal and contrary to the Federal Statutes that Virginia Dare's only hope is to bring in some other matters not connected with that contract and divert the court's attention from the contract of June 6, 1940, on which contract the counterclaim depends entirely, and for supposed breach of which the jury rendered a verdict on the counterclaim for $60,000 for Virginia Dare. (Record 188, 189).

The contract of May 24, 1940, serves no purpose, either in the record or by reference in petition or brief, to clarify or justify the Contract of June 6, 1940, held below to be vicious, or to throw any light upon the petitioner's application for review. The only effect of suppressing the vicious document of June 6, 1940, and substituting an innocuous one appears to be to turn away attention from the contract of June 6, 1940.

On the trial of the case in the District Court, Norfolk Southern repeatedly raised the question of the illegality of the contract of June 6, 1940 (Record 46), and also requested a directed verdict against Virginia Dare on the counterclaim (Record 180, 203), both before and after verdict; which request for directed verdict ought to have been granted; and immediately

after verdict asked judgment pursuant to Rule 50, Rules of Civil Procedure; and the Circuit Court of Appeals would have been doing a vain thing to send the case back for further trial by the District Court when final judgment should have been entered in favor of Norfolk Southern on the counterclaim, pursuant to the Rules of Civil Procedure, Rule 50.

When the contract of June 6, 1940, is inspected, it clearly demonstrates that the two *competing* carriers of freight by motor trucks, Virginia Dare and Norfolk Southern, whose largest places of competition were Norfolk, Virginia, and Elizabeth City, North Carolina, definitely agreed that Norfolk Southern would furnish, free of charge to Virginia Dare, all terminal and pick-up and delivery services at those places so long as Virginia Dare would run only two round trips a week between those places, Virginia Dare having previously run one or more round trips *every day* except Sunday, and upon the contract taking effect, always thereafter *reducing its hauls* to only two round trips a week. (Record 81).

This contract was never submitted to the Interstate Commerce Commission, and clearly violated both the Sherman Act and the Interstate Commerce Act.

The counterclaim of Virginia Dare relied upon breach of sections 3 and 4 of the contract of June 6, 1940, which sections read as follows (Record 212, 213):

> "(3) Norfolk Southern Bus Corporation will establish and operate a freight terminal at Norfolk with pick-up and delivery service and will permit Virginia Dare Transportation Company

the use of same on a joint user basis—it being understood, however, that so long as Virginia Dare Transportation Company operates two or less round trips per week between Norfolk and Elizabeth City, no charge will be made for common user or terminal service including pick-up and delivery. In the event schedules exceed this, then the tonnage so handled on additional trips will be allocated at the same unit costs as apply to Norfolk Southern Bus Corporation in the handling of its own business; it being understood that in the event the control of Virginia Dare Transportation Company shall be changed to other parties, then this agreement shall be null and void;

"(4) Norfolk Southern Bus Corporation shall establish and operate a freight terminal at Elizabeth City and will permit Virginia Dare Transportation Company to use same on a *common user basis*. So long as Virginia Dare Transportation Company operates two round trips or less from Elizabeth City to Norfolk, no charge shall be made for this including pickup and delivery except that on business from Elizabeth City to Manteo, Virginia Dare will with its lay-over trucks make such pickup and when Norfolk Southern trucks do this at times when Virginia Dare trucks are not available, Virginia Dare will perform for Norfolk Southern Bus Corporation an equal service, based upon 100 lbs., when they are not in use in Elizabeth City.

> "The arrangements herein outlined in (3) and (4) may be discontinued on thirty (30) days written notice from Virginia Dare Transportation Company in which event the two companies will endeavor to arrive at a working plan satisfactory to both. No terminal charges shall be allocated to either company taking into consideration through tonnage on through trucks which do not receive or deliver said tonnage at Elizabeth City."

After adopting in its brief the statement contained in its petition the petitioner insists that the Circuit Court of Appeals erred in several particulars, designated A to E, which we will mention hereafter.

But the petitioner having spoken very slightly on the quality of the Contract of June 6, 1940, upon which alone its counterclaim depends, we deem it appropriate here to emphasize the correct views upon that instrument.

We maintain:

(1) It violates the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 50 Stat. 693 (1937), 15 U. S. Code 1, and kindred statutes.

(2) It is violation of the Interstate Commerce Act, as amended by the Motor Carrier Act and the Transportation Act of 1940, Title 49 U. S. C. A. Among other vices it admittedly lacks the requisite approval of the Interstate Commerce Commission.

RESTRAINT OF TRADE

The familiar principle of the Anti-Trust Laws that every contract, combination or conspiracy in restraint of interstate commerce is illegal and unenforceable has been presented to this court, and others, in a variety of ways. Rules which may be deduced from the decisions are that the purpose and intent of such agreements, as well as their letter, the inducement for their making and the operation thereunder, the potential as well as the obvious and actual effect, are all matters to be considered in determining whether the arrangement offends.

Also it is well recognized that the first step toward monopoly is as offensive as the final one. The devious methods adopted are often but entering wedges which may open a wider breach. These the courts have sought to curb regardless of disguise.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

United States v. *Joint Traffic Association,* 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

Standard Oil Co. v. *United States,* 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

United States v. *Union Pacific Railroad Co.,* 226 U. S. 87, 33 Sup. Ct. 53, 57 L. Ed. 124.

United States v. *Reading Co.,* 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.

United States v. *American Tobacco Co.,* 221 U. S. 181, 31 Sup. Ct. 632, 55 L. Ed. 663.

Joint terminals and terminal services have in many cases been the first step to be followed by others tending to restrict the freedom of trade.

United States v. *Terminal R. Asso.*, 224 U. S. 383, 56 L. Ed. 811.

Union Pacific R. Co. v. *U. S.*, 313 U. S. 450, 85 L. Ed. 1453.

In the case at bar it seems clear that Norfolk Southern and Virginia Dare entered into arrangement for common user of terminal facilities and pick up and delivery service in such manner as to lead to a lessening of public services. The motive and the result seem, from the contract itself, the attending circumstances, and the ensuing operation, to have been to eliminate competition between these two carriers, at least for all beyond two days per week, and to establish an arrangement by which other competitors should be placed at disadvantage. It was a long step toward monopoly.

The contract of June 6, 1940, was on its face absolutely illegal and void. Its heart and soul was to reduce competition by withdrawing Virginia Dare hauls from all week days to twice a week, in consideration of Norfolk Southern rendering free terminal, pickup and delivery service in consideration of decreased competition.

THE EVIDENCE

In considering whether the Circuit Court of Appeals is supported in its decision by evidence sufficient to show the illegality of contract we may consider the proofs offered in the following aspects:

1. The *Contract itself* is illegal on its face. By its terms it provides that the two companies will pool their services and facilities. Every week day Norfolk Southern will provide for Virginia Dare free terminal pickup and delivery service, provided Virginia Dare shall operate only twice a week instead of six times as before. Each will carry in its trucks goods consigned over the other's line.

Section 2 of the contract sets out a schedule of division of revenues in which it is clearly contemplated that one company shall perform the line haul of the other. (R. 211, 212.)

Section 3 provides that Norfolk Southern shall permit Virginia Dare the use of its freight terminals and pickup and delivery services "on a joint user basis," it being understood however that "*so long* as Virginia Dare Transportation Company operates *two or less* round trips per week between Norfolk and Elizabeth City, *no charge* will be made." (Italics added).

Section 4 of the contract makes similar provision with respect to services at Elizabeth City.

That the discontinuance of trips by Virginia Dare on four days per week was the impelling inducement for the arrangement is manifest upon the face of the instrument. That, even if it were all, is sufficient to sustain the judgment of the Circuit Court of Appeals.

2. THE ADMITTED EVIDENCE in the District Court (in addition to the contract itself) is ample to establish the illegality, both in (a) purpose and (b) operation; without contradition.

Guy H. Lennon, the General Manager of Virginia Dare, who handled all negotiations and directed all affairs testified at page 73 that in the use of terminals and the utilization of pickup and delivery services his company was acting under the contract of June 6, 1940.

At pages 78-80 Mr. Lennon testified that prior to the operation under that paper his company had operated between Norfolk and Elizabeth City as well as between those cities and his company's home at Manteo, and that this had continued for some years.

At page 81 Lennon says these operations were daily except Sunday.

Also at page 81 he says that as soon as Norfolk Southern started to operate Virginia Dare ceased to operate daily between Elizabeth City and Norfolk and operated only two days per week, Tuesday and Thursday.

At page 82 Lennon testifies that his company "continued not to operate between Norfolk and Elizabeth City in the carrying of any freight from that time until the end of 1944," when respondent discontinued the facilities.

At pages 83 and 84 Mr. Lennon states that during a part of the time Virginia Dare rates were lower than Norfolk Southern on many articles so that a shipper was compelled to pay the higher rate on days other than Tuesday or Thursday, because "He could not use the Virginia Dare truck, because that was not running." On Tuesdays and Thursdays competitive rates were effective, but on Mondays, Wednesdays, Fridays and Saturdays the competition was eliminated. (See bottom of Page 83).

At page 84 Mr. Lennon testified to the pooling of facilities of line haul as well as terminals, saying that the terminal agent "would bill out freight on Tuesday and Thursday on our trucks * * * and on all other days on Norfolk Southern."

These statements, admitted in evidence in the District Court, not contradicted, are ample to show illegality and therefore to support the direction of verdict and judgment against petitioner as ordered by the Circuit Court of Appeals. They establish a transaction illegal both in purpose and operation, both in design and execution.

Thus, in addition to being illegal on its face, the illegality of the contract of June 6, 1940, was doubly shown by the evidence which was actually admitted before the jury, the admitted evidence of Virginia Dare's own General Manager and Treasurer, Guy H. Lennon (R. 24) distinctly showing that upon operation beginning under this contract Virginia Dare ceased hauls between Norfolk and Elizabeth City, except two round trips a week. See especially his admitted testimony, Record 81 and 83, and also his testimony, Record 90, saying the matter was not submitted to Interstate Commerce Commission.

We submit that such an arrangement, however disguished, is inhibited by the Anti-Trust Laws and the decisions of this court. The substance of the arrangement is amply established by evidence.

INTERSTATE COMMERCE ACT

What has been said above of evidence of illegality under the Anti-Trust Acts, as amended, also applies to the Interstate Commerce Act.

The contract itself and also the evidence admitted in the District Court clearly establish a case of pooling of services, traffic and facilities, if not of earnings. Terminals were to be enjoyed on a common user basis. Pickup and delivery were to be performed by one company for both in common. Line haul was to be performed by either company which might make the day's trip for both itself and the other. Trucks of both were made available. Loadings were to be kept at a monthly proportion of one-third and two-thirds.

49 USCA 5 (1) forbids any such arrangements without specific approval of I.C.C., and declares them unlawful.

49 USCA 5 (2) provides the machinery by which approval may be obtained.

Terminal services are within the supervisory powers of the commission.

United States v. *Brooklyn Eastern Dist. Terminal,* 249 U. S. 296, 63 L. Ed. 613, 16 A.L.R. 527.

Union Stock Yard & Transit Co. v. *United States,* 308 U. S. 213, 84 L. Ed. 198.

Union Pacific R. Co. v. *United States,* 210 U. S. 450, 85 L. Ed. 1453.

New York Dock Ry. v. *Penn. R. Co.,* 62 F. (2d) 1010 (CCA 3rd Circuit).

United States v. *Wabash R. Co.,* 321 U. S. 403, 88 L. Ed. 827.

United States v. *Terminal R. Asso.*, 224 U. S. 383, 56 L. Ed. 811.

As to pickup and delivery services rendered by common carriers, these are by express provision of statute regulated as a part of the transportation.

3. THE EXCLUDED EVIDENCE of illegality may be considered in two categories (a) admissions from petitioner's principal officer and (b) other evidence.

3(a). In the first class we find:

At page 93 of Appendix a letter of November 11, 1940, from Mr. Wickersham (now deceased) to Mr. Lennon makes reply to some complaint Mr. Lennon seems to have made about compliance with the understanding. Mr. Wickersham says:

> "Of course, there will be variations, as you will readily understand, from day to day but a record will be kept and comparisons made so that by the end of the month the loading can be brought into line on the basis of two-thirds Norfolk Southern and one-third Virginia Dare —you handling the one-third on your truck and we handling the two-thirds on ours and the billing for shipments placed on each company's trucks made by and for that company."

At page 99 is a letter from Mr. Lennon to Mr. Wickersham referring to the letter just quoted and saying:

> "Under date of November 12, 1940, we wrote to you, requesting that we be mailed a daily

> manifest, showing total freight hauled by Norfolk Southern trucks from Norfolk to Elizabeth City, in order that we might be able to check revenues due us, under the one-third, two-thirds division, as outlined in your letter of November 11th, 1940, and accepted by us."

And at page 101 is another letter from Mr. Lennon to Mr. Wickersham dated July 28, 1943, reading:

> "Under date of June 6, 1940, we signed an operating contract with the Norfolk Southern Bus Corporation. This contract covers the movement and handling of freight over the routes between Norfolk, Virginia, Elizabeth City, North Carolina, and Manteo, North Carolina. On several occasions there has been some confusion as to the handling of freight between Norfolk and Elizabeth City, probably due to the fact that your Norfolk Agent was not familiar with the terms of the contract.
>
> "It was agreed between us that tonnage between Norfolk and Elizabeth City should be divided, two-thirds Norfolk Southern and third Virginia Dare."

Respondent submits that these statements made by the principal officer and general controller of the affairs of the petitioner, who negotiated for it the Supplementary Contract in question, undertaking to interpret it in operating terms, and actually insisting upon things he says were agreed, can hardly be denied by petitioner or explained away.

To remand the case that petitioner may be given opportunity to deny or explain away such unequivocal matter would indeed be vain.

3(b). As to Excluded Evidence Other than Admissions, the same may be said. This largely consisted of the testimony of Mr. Bragg and Mr. Nelms (Record pp. 137-156) with reference to transportation practices and freight rates. They spoke in enlargement of but not in variance from evidence already in the record. The petitioner's reading of the Circuit Court of Appeals opinion may claim to the minds of its counsel that the court based its decision upon the excluded letters and testimony. It does not so read to our minds. That court, without this exclude evidence, has found ample proof of illegality. (Record 227).

In no aspect then do we find that the Circuit Court of Appeals has preempted the function of the jury. It has only exercised a function long practiced by the courts, and which the courts should not surrender.

Regardless of all excluded evidence the illegality of the contract of June 6, 1940, was clearly manifested, and that it violated both the Sherman Act and Interstate Commerce Act, and was not submitted to Interstate Commerce Commission.

We submit that the statement of the case by Virginia Dare is very defective, and Norfolk Southern's cross petition correctly states the case and facts.

The authorities relied upon by Virginia Dare, we maintain are not at all in point, and are merely a show of authority, for example:

In *Clone* v. *West Virginia Pulp and Paper Co.*, decided March 3, 1947, 91 L. Ed. Adv. Sheet 9, p.

683, no motion for judgment had been made under Rule 50 of the Rules of Civil Procedure, but such motion had been made in the case at bar. (R. 203, 180, 46).

Reynolds v. *U. S.*, 292 U. S. 443; 78 L. Ed. 1353, seems to have no bearing whatever on the case at bar, but in that case the judgment was reversed with directions to enter final judgment below.

McCandles v. *U. S.*, 298 U. S. 342; 80 L. Ed. 1205, is, like the other cases, out of point, and merely holds that the rejection of relevant evidence was prejudicial.

The minute division of specifications of error on page 23 of petitioner's brief may be shortly answered.

A

Claims that the evidence excluded by the District Court should have been excluded.

We submit that it was obviously admissible but regardless of that evidence the illegality of the contract of June 6, 1940, was clear.

B

Claims that the Circuit Court of Appeals usurped the rights of the jury.

We submit that the Appellate Court was well within its power and duty.

Indeed the petitioner offers no sound reasoning. Its only citation to sustain the point is *Dimick* v. *Schiedt*, 293 U. S. 474, 79 L. Ed. 603. While that case very

naturally recognizes the general principle, the fact situation there involved differs too widely from that in the present case, for the decision to be of assistance. There the question was whether a judge may increase an inadequate tort verdict with the consent of the defendant against whom it is rendered, but against the wishes of the plaintiff. There the lower court had entered judgment for an amount greater than the verdict and in so doing denied the plaintiff the opportunity to seek even more from a second jury. Nowhere in the record of that case did there appear an admeasurement of damages, as would have been the case if the plaintiff had sued for a fixed sum, as on a note. And the issue drawn in question on appeal was that of damages only.

In the case at bar the Circuit Court of Appeals found a record presenting clearly and unequivocally transaction so illegal that no jury could be permitted to find it otherwise. On the counterclaim the burden was on petitioner. It failed to make out its case. The trial court should have withdrawn the counterclaim from the jury as upon demurrer to evidence or directed verdict. This power, universally exercised by the courts has never been considered to "preempt" the jury's functions.

C

Petitioners point C is but a repetition of its point B, and requires no further attention.

D

Petitioner seems to strain in its contention that the Circuit Court of Appeals should have sent the case back for new trial because Mr. Lennon had said that shippers had a choice of carriers. To assert that when a shipper sought to exercise such a choice he was allowed to do so, is certainly not at variance with the one-third, two-thirds loading practice.

As to the freight rates being fixed by law we think petitioner is in error. Interstate Commerce Commission approves but does not initiate. Approval is ordinarily had in the absence of opposition. There is in the record no contradiction of Mr. Lennon's own statement that there was for a time a difference between the rates of the two companies, and that Virginia Dare ceased competition four days out of six.

E

Petitioners point E is but a repetition of its point B, and requires no further attention.

We respectfully submit that there is no reason whatever for *certiorari* being granted in this case.

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